

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

76-7180

United States Court of Appeals

FOR THE SECOND CIRCUIT

FILED OCT 12 1976

TRAMP SHIPPING Co., INC.

SECOND CIRCUIT

Plaintiff-Appellee,

—against—

GOTAAS LARSEN A.S., SANKO STEAMSHIP Co., LTD., PARABOLA
SHIPPING UK LTD., HIMOFF MARITIME ENTERPRISES, LTD.,

Defendants-Appellees,

and

—against—

EMERALD SHIPPING CORP. (LIBERIA),

Defendant-Intervenor-Appellee,

and

—against—

MARDORF PEACH & Co. LTD.,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF
ON BEHALF OF DEFENDANT-APPELLANT
MARDORF PEACH & CO. LTD.

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Statement

This brief is submitted on behalf of appellant, Mardorf Peach & Co. Ltd. (Mardorf), in reply to the separate briefs of the various appellees.

Mardorf's opposition to a consolidated arbitration transcends matters of form. The proceedings below have been confusing and disjointed. This was inevitable from the nature of the unprecedented relief demanded in the complaint seeking to consolidate non-existing arbitrations. Understandably the intermediate charterers have been content to go along with this procedure so long as each considered it could pass its liability, if any, to the next charterer down the chain.

This "buck" passing stopped with Mardorf which has valid and substantive reasons for opposing the consolidation.

Mardorf bargained for and obtained the services of the vessel, AGIA ERINI II, to lift a cargo of grain from the port of Churchill to Liverpool. In doing so it did not make any warranty or representation as to the conditions at the port of Churchill but instead agreed to pay, and did pay, in addition to charter hire, the cost of insuring the vessel against such hazards as calling at Churchill might entail (App. 26a, cl. 34).

Therefore, Mardorf's opposition to the proceedings below had two principal objectives:

- (a) to avoid entanglement in expensive litigation which its bargain with Himoff was intended to avoid; and
- (b) in any event, to avoid such entanglement until a clear showing has been made that Himoff has a valid and enforceable claim against Mardorf subject to arbitration under the Mardorf charter, despite the special nature of the terms on which Mardorf engaged the services of the vessel.

If these objectives are not achieved, it will result from the failure of the District Court and the appellees to observe certain fundamentals in the pleadings and practices which they have pursued. This court has stressed that adherence to fundamentals is essential. In *Compania Espanola de Pet., S.A. v. Nereus Ship.*, 527 F.2d 966 at 968, this court stated:

“... That the observance of these fundamentals is in the interest of justice, that it tends to avoid or at least reduce confusion, the great enemy of justice, and that it greatly facilitates the functioning of an appellate court of review, is too obvious for comment. We are sorry to say that in the matter now before us neither the judge nor any of the parties seem to have been aware of some of these fundamentals, except after the event.”

In this reply brief Mardorf will answer the contentions of the various appellees in the perspective of the substantive reasons why it opposes involvement in this cumbersome proceeding which threatens serious prejudice to Mardorf's contract rights.

Scope of Appeal

At pages 5 and 6 of its brief appellee, Tramp, discusses the court's memorandum decision and order of August 4, 1975 [filed August 6, 1975] (App. 64-65a) based on plaintiff's motion dated July 20, 1975 for a “consolidated arbitration”. It correctly indicates that this was not binding on Mardorf because it was made prior to Mardorf's entry into the case. On the other hand, it is not wholly accurate in stating that no appeal from this order was taken. The court's order concludes with the words: “Submit order accordingly” but no order was ever entered upon that decision. Nevertheless, plaintiff appealed from parts of the decision and later withdrew its appeal.

A brief summary of the proceedings below will clarify the scope of this appeal.

Plaintiff never attempted service of process on Mardorf. It was not until May 28, 1975 that Mardorf became involved when Himoff attempted to serve its cross-claim (without any process) in Canada on Mardorf Peach & Co. (Canada) Ltd., a different entity from the defendant, Mardorf (App. 74a).

Since the complaint and cross-claim sought both a judgment for money damages and the alternative relief of an order for consolidated arbitration, it was necessary for Mardorf to resist the attempted service on it at least so far as the complaint sought a judgment for money damages. This it did by its motion of July 29, 1975 (App. 68-69a) to set aside the attempt of service in Canada and to dismiss the cross-claim for lack of jurisdiction. This motion was pending when the court filed the memorandum decision and order of August 4, 1975 (filed August 6, 1975) on plaintiff's motion for a consolidation.

In its decision the court, appreciating that Mardorf was not yet in the case, stated that: "Himoff is directed to perfect jurisdiction over Mardorf."

Pursuant to the district court's direction, attorneys for Himoff wrote a letter dated August 7, 1975 (App. 132a) addressed to Mardorf's London office purporting to demand "arbitration of the disputes which are the subjects of an action in the United States District Court in the Southern District of New York (giving the title of the case)"* and added that there was pending before the

* This demand did not nominate an arbitrator and did not refer to any claim or dispute between Himoff or Mardorf. The arbitration clause in the Mardorf charter provided that an arbitrator was to be named by each party and the third was to be selected by the two so chosen. Therefore, a demand for arbitration under such an agreement which neither named an arbitrator nor identified a claim under the charter was an exercise in futility and should be disregarded.

court "a motion by plaintiff for an order for a consolidated arbitration of all disputes among the plaintiff and defendants etc." At about this time the Clerk of the District Court, at the request of Himoff's attorneys, mailed an "additional" summons, the complaint, and Himoff's cross-claim to Mardorf's London office.

The hearing of Mardorf's motion took place on August 15, 1975 (App. 99a). On August 19, 1975, the court endorsed on Mardorf's motion papers: "Motion to dismiss is denied. Motion to vacate service is moot due to service F.R.C.P. 4(i)". (App. 117a).

On August 29, Mardorf moved for a rehearing of its motion and, alternatively, for an order vacating the second attempted service of the "additional" summons and Himoff's cross-claim for lack of jurisdiction for the reason, among others, that the second attempted service on Mardorf, a foreign corporation, was invalid because it was not present in New York, had no agents here and never transacted any business in this jurisdiction.

On the argument of this motion, the court directed Mardorf's counsel to respond to the plaintiff's motion for a consolidated arbitration (App. 115a) which was the subject of the court's memorandum decision of August 4th and which has never been reduced to a signed order. Pursuant to this direction, Mardorf addressed itself to the plaintiff's motion for a consolidation by submitting an affidavit by Lawrence G. Cohen sworn to September 4, 1975 (App. 136a-144a). Further oral argument was had on September 22 (App. 145a-161a) which was followed by the court's decision of October 16, 1975 [filed October 21] (App. 162-165a) denying Mardorf's second motion and directing that a new proposed order be submitted "in compliance with this and the original memorandum (of August 4) providing for the nomination of arbitrators".

When an order was not submitted or signed by the Court, Mardorf took a precautionary appeal from the court's

memorandum decision of October 16, 1975 (App. 166a). This precautionary appeal is now before this court together with Mardorf's subsequent appeal from an order filed March 9, 1976.

The plaintiff's appeal from the District Court decision of August 4th came on for conference with this Court's Staff attorney on October 9, 1975. The result was an agreement of all parties, except Mardorf, to a formula for the appointment of arbitrators and the withdrawal of plaintiff's appeal.

Delay in signing a consent order to embody this agreement ensued not only because of Mardorf's refusal to participate in view of its pending appeal but also because the defendant, Himoff, which was then in bankruptcy, was uncertain as to whether it could any longer participate in the proceedings. This led to another motion by plaintiff which was made on December 29, 1975, for an order (1) directing all parties to proceed to arbitration, subject to the possibility of a stay of proceedings as to Himoff, as a bankrupt, and (2) providing for a formula for the appointment of arbitrators (App. 168-169a).

This motion came on for oral argument on February 23, 1976 (App. 209-225a) and resulted in the District Court's order of March 5, 1976, [filed March 9] (App. 226-7a) from which Mardorf has also appealed (App. 228a).

One of the confusing aspects of the proceedings below is the fact that plaintiff's original motion for a consolidated arbitration, resulting in the Court's memorandum decision of August 4, 1975 and the Court's memorandum decision of October 16, were never reduced to signed orders, although in each decision, parties were directed to submit orders. Presumably they have been superseded by the court's order of March 5, 1976 [filed March 9th] entered upon plaintiff's motion of December 29, 1975, from which Mardorf also appeals.

POINT I

The Court's Authority to Enforce Arbitrations.

Certain appellees have expressed erroneous views concerning jurisdictional issues. Like the complaint, Himoff's cross-claim contained a two-fold demand for relief: (1) for indemnity for money damages and (2) for an order consolidating alleged arbitrations and compelling Mardorf to participate therein. Insofar as the complaint claimed money damages based on breaches of charter, the court had subject matter jurisdiction under the Maritime Clause of the Constitution, Article III, Section 2, clause 3. So far as the complaint purported to compel arbitrations, the court's subject matter jurisdiction also stems from the Maritime Clause of the Constitution but its authority to exercise it resides in the Arbitration Act (9 U.S.C. §1 *et seq.*) as will be more fully discussed below.

As previously pointed out when Himoff attempted to serve Mardorf with its cross-claim, the plaintiff having failed to serve process on Mardorf under the complaint, Mardorf made two motions to the validity of the attempted services on it. Up to that time, there had been no demand by Himoff on Mardorf for arbitration.

In its August 4th memorandum decision, (rendered while Mardorf's first motion was pending) dealing with plaintiff's motion for a consolidated arbitration, the court directed Himoff to perfect jurisdiction over Mardorf (App. 66a). Himoff then purported to make demand on Mardorf for arbitration under the Mardorf charter (App. 132a). When that was done and Mardorf's second motion, which had been previously made, came on for hearing on August 15, 1975, the Court steered the oral argument from questions concerning the validity of the service and personal jurisdiction over Mardorf to the question of the court's jurisdiction to compel Mardorf to arbitrate in view of the

recent arbitration demand served by Himoff (App. 103a). The questions then arose for the first time whether the demand was sufficient or proper and whether the court's jurisdiction to compel Mardorf to arbitrate was properly invoked.*

Some appellees attempt to support the decision below on the ground that plaintiff's motion to consolidate was grounded, in part at least, on Section 4 of the Arbitration Act, but plaintiff had no agreement to arbitrate with Mardorf which the court was entitled to enforce. Only Himoff, with whom Mardorf had an arbitration agreement was entitled to invoke Section 4 of the Arbitration Act and it had not done so at that time and still has not done so.

Indeed, it is inaccurate to say that plaintiff's motion (45-46a) insofar as it might concern Mardorf and appellees other than Gotaas, was made pursuant to Section 4. The motion sought alternative relief (1) directing the defendants to proceed to a "consolidated arbitration" of all claims etc. and, alternatively, (2) directing the defendant, Gotaas Larsen A/S (plaintiff's immediate charterer) to

* Mardorf's voluntary appearance before the District Court to contest *in personam* jurisdiction so far as the suit was one for money damages was in no way a submission to the court's jurisdiction for other purposes as appears to be argued by one of the appellees. This Court has specifically held to this effect in the case of *Kerr v. Compagnie de Ultramar*, 250 F.2d 860 (2nd Cir., 1958), when it stated:

"The belief that Ultramar has lost its right to establish lack of jurisdiction over its person by showing that it was not doing business in New York is apparently based on a legal misconception. By Rule 12(b), Federal Rules of Civil Procedure, jurisdiction over the person may be attacked either by motion or by answer. A voluntary general appearance does not constitute a waiver of this defense if it is properly raised in the answer. *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 3 Cir., 1944, 139 F.2d 871, certiorari denied, *Orange Theatre Corp. v. Brandt*, 1944, 322 U.S. 740, 64 S. Ct. 1057, 88 L. Ed. 1573; *Blank v. Vitker*, 7 Cir., 1943, 135 F.2d 962; *Emerson v. National Cylinder Gas Co.*, D.C. Mass. 1955, 131 F. Supp. 229." 250 F.2d at 864.

appoint an arbitrator. Only the second alternative was authorized by Section 4 and that only in respect of Gotaas, Tramp's immediate charterer. Section 5 referred to in the motion was totally inapplicable and neither Section 4 nor any other provision of the Arbitration Act had anything to do with the first alternative of "consolidating" arbitrations whether pending or otherwise.

Some appellees contend that the Court, in directing a consolidated arbitration, was treating Himoff's cross-claim against Mardorf as a petition under Section 4. However, the court did not purport to so treat the cross-claim and could not properly do so. Instead, in its memorandum decision of October 16 (162-165a), the court grounded its jurisdiction over Mardorf, with respect to arbitration, on Mardorf's agreement to arbitrate in New York. The court expressly stated:

"The court takes the position that Mardorf has notice of the action and cross-claim and is within the jurisdiction of the court by virtue of the arbitration clause which is contained in each of the charters." (Emphasis added)

* * *

"The jurisdictional question for this limited purpose is foreclosed against Mardoff (sic) Peach Ltd. *Insurance Company North America v. S.S. Jotina*, 1974 A.M.C. 1190."

What the court below failed to appreciate was that the *Jotina* case to which it referred was concerned only with *personal jurisdiction*. The authority of the court to enforce an arbitration agreement is something else and derives solely and entirely from the Arbitration Act which this court has held to be not merely "procedural" but "national substantive law".

In *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir., 1959), this court called attention to the "dark chapters in legal history" concerning

the validity and enforceability of arbitration agreements prior to the enactment of the Arbitration Act and the legislative history of that Act and held:

“We, therefore, hold that the Arbitration Act in making agreements to arbitrate ‘valid, irrevocable, and enforceable’ created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are *inextricably intertwined.*” (Emphasis added) 271 F.2d at 409.

It, therefore, appears that the Arbitration Act created “national substantive law” and encompasses questions of “interpretation and construction” as well as questions of “enforceability of arbitration agreements” which are “inextricably intertwined.” Accordingly, the court’s authority to enforce an arbitration agreement can only be exercised in conformity with the Arbitration Act, Section 4 of which requires, among other things, that the “party aggrieved” file a “petition” for an order directing an arbitration to proceed “in the manner provided for in such an agreement.” In the present case, so far as concerns an arbitration pursuant to the arbitration agreement in the Mardorf charter, Himoff alone can be the “party aggrieved” and Himoff has not filed such a “petition.”

Therefore, although Mardorf may have submitted itself to the court's jurisdiction by reason of its agreement to arbitrate in New York, that did not make it amenable to jurisdiction for any other purpose as pointed out in the *Jotina* case (*supra*); see also *Farr & Co. v. Cia. Intercontinental De Navigacion*, 243 F.2d 342 (2nd Cir., 1957). This did not authorize the court to invoke its powers under the Arbitration Act without compliance with the requisites of the Act as provided in Section 4.

POINT II

Only "Pending" Arbitrations May Be Consolidated and Consolidation Cannot Affect Substantive Rights.

The court's authority to consolidate arbitrations stems from Rule 42(a) Fed. R. Civ. P. which refers to actions "already pending" (See Mardorf "Brief" p. 13).*

* This appears to be the first case in which this Court has had to consider the consolidation of more than *two* arbitrations. In the *Nereus* case, (*supra*), this Court held with respect to arbitration agreements that it was an important contract right "that each party have his own representative on the panel". In that case the Court was able to satisfy the contract rights of the parties by directing that a panel of five (5) arbitrators be selected, three (3) to be appointed by each of the three (3) parties and two (2) additional by the unanimous consent of the three (3) so chosen.

In the present case, the Court is asked to consolidate six (6) arbitrations involving seven (7) parties. By using the same formula the panel would consist of thirteen (13) arbitrators. The method of selection ordered by the Court below would provide a panel of five (5) arbitrators by a process of selection which disregards the right of each party to be represented on the panel as borders on a lottery.

Another consideration is that each of the intermediate charterers wears two hats, an owner's hat vis-a-vis his immediate charterer and a charterer's hat vis-a-vis his immediate owner or disponent owner, as the case may be. If truly common issues of law and fact exist there are really only two sides to each dispute, the owner's side and charterer's side. In these circumstances, a three (3) man panel consisting of one arbitrator to be appointed by the first owner, one by the last charterer, and the third by these two (2),

At the time of the filing of the complaint, there were no "pending" arbitrations with the possible exception of an arbitration between plaintiff, Tramp, and its immediate charterer, the appellee, Gotaas. None of the other appellees had demanded arbitration under their respective charterers. As has been shown in Mardorf's "Brief" and as will be discussed further below, to consolidate arbitrations there must be an unbroken chain of privity and common issues of law or fact. This case demonstrates that unless and until there are "pending" arbitrations, i.e. arbitrations which have been demanded and acceded to, it cannot be shown that these requisites exist.

Consolidation of suits at law cannot affect substantive rights of the parties to the individual suits. This court, in *Mac Alister v. Gutermuth*, 263 F.2d 65 at 68 (2nd Cir., 1958), approving consolidation of suits for the pre-trial as well as trial purposes, has called attention to the policy underlying consolidation under Rule 42 by quoting from a decision of the Supreme Court in *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-497, 53 S.Ct. 721, 727, 77 L.Ed. 1331 (1933), as follows:

"[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties, in one suit parties in another."

would seem to be the only feasible way to constitute a panel which would not be unwieldy.

However, this would not satisfy the contract rights of each party to "have his own representative on the panel" and this could be overcome only by a requirement in all such cases that the intermediate charterers, who seek a consolidation, waive their rights to appoint an arbitrator as was done in the leading case of *Vigo Steamship Co. v. Marship Corp. of Monrovia*, 26 N.Y. 2d 157 (N.Y. 1970) cert. denied 400 U.S. 819.

It is respectfully submitted that these considerations must be taken into account along with the other factors mitigating against consolidation in the present case.

The same policy must apply to arbitrations. Thus, separate arbitrations cannot be merged into a single arbitration or change the rights of the parties or make those who are parties in one arbitration parties in another. In a so-called "consolidated arbitration" the function of the arbitration panel is to decide the dispute under each charter separately. It is not their function or right to resolve questions as to the propriety of consolidation such as the question of whether there was an arbitration agreement between Parabola and Himoff, such as the question of whether an unwritten arbitration agreement can be enforced, or the question of whether an award can be made for or against a party who is in bankruptcy. These are questions for the courts and have not been answered by the lower court in this case.

Arbitrators, be they commercial men or not, can only function within the framework of the arbitration clause in each charter and are empowered to make determinations of disputes within that framework. (See Mardorf "Brief" p. 20). By ordering a consolidation of the heretofore non-existent arbitrations in the present case, the Court is requiring arbitrators to perform tasks which they have no power to perform i.e. render awards on questions arising outside of the framework of the individual arbitration agreements. It is for this reason, among others, that consolidation is inappropriate under the circumstances obtaining in the case. The likely result will be that Mardorf and/or various appellees will find it necessary after the arbitration to set aside or modify the arbitration award for arbitrators' misconduct in exceeding their powers.

POINT III

Privity of Contract.

One of the essentials to a consolidation of separate arbitrations is that there be an unbroken chain of privity tying the several arbitrations together. This is necessary because the arbitrators, be they commercial men or otherwise, are only authorized to decide disputes referable to arbitration to the extent such powers are granted by the separate arbitration agreements in each of the successive charters.

If this chain is broken by the absence of parties to the chain or the absence of any enforceable arbitration agreement in any of the charters in the chain, the panel of arbitrators cannot make an award which bridges over the missing link. Appellees do not appear to dispute this principle. Instead, some of them merely question Mardorf's standing to raise it. They contend that it is not raised by the parties to the unenforceable arbitration agreement and only they are entitled to do so.* In effect, they are contending that by a conspiracy of silence or inaction, the necessary chain of privity can be forged and by this device a party below the break in the chain can be forced into a consolidation to arbitrate with strangers. In this instance, the break in the chain runs even deeper. There has been no demand for arbitration, or claim asserted by Parabola against Himoff based on their alleged oral charter party. These two defendants filed a joint answer to

* The Supreme Court of the United States, in discussing the requisites for standing, considered that a party has "standing" to contest an issue when that party has:

"... alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination . . .". *Flast v. Cohen*, 392 US 83, 99, 88 S.Ct. 1942, 20 L. Ed. 2d 947 (1968).

the complaint containing a joint cross-claim against the defendant, Mardorf (App. 21a). Nowhere in the answer or cross-claim or elsewhere in the record is it indicated that any claim has been made by Parabola against Himoff under their oral charter. Obviously if Parabola does not recover indemnity from Himoff, Himoff can have no claim for indemnity against Mardorf. In this state of affairs it would be futile to compel Mardorf to join in a consolidated arbitration and a gross imposition upon it.

To add to the seriousness of this breach in the chain of privity is the fact that shortly after these proceedings were begun Himoff was forced into bankruptcy and was adjudicated a bankrupt. This will be discussed under the next point in this brief.

POINT IV

The Bankruptcy of Himoff.

Several appellees have inaccurately represented the facts in describing the actions of the Trustee in Bankruptcy for Himoff at a hearing before Judge Werker on February 23, 1976 (App. 209a). By wrenching one sentence of the Trustee out of context, they make it appear that the Trustee consented, on behalf of Himoff, to have the arbitration proceed. This is simply not the case. Mr. Louis Kruger, the Trustee in Bankruptcy of Himoff, only gave a qualified consent to Himoff appearing in the arbitration based on the condition that Himoff and Parabola were found to be one entity in the bankruptcy proceedings. He stated that:

"If Bankruptcy Judge Babitt finds that this is not the fact, and they are in fact separate enterprises and there is no agreement between Himoff under which we would be bound to arbitrate that matter then *I would not be willing to arbitrate this matter.*" (App. 225a) (Emphasis added)

As of this writing, the Bankruptcy Court has not rendered its decision on this point.

Even if Mr. Kruger had given his unqualified consent to Himoff's participation in the consolidated arbitration such consent would have been given without the necessary concurrence of the Bankruptcy Court and would, therefore, be ineffective. This Court recently held in *Truck Drivers Local Union No. 807 v. The Bohack Corporation*, slip op. 5163 (decided August 9, 1976), that where a debtor-in-possession under a Chapter XI bankruptcy stipulated that he would arbitrate a controversy without having obtained the consent of the Bankruptcy Court, such stipulation was ineffective. Circuit Judge Gurfein, in his opinion, stated:

"What we have here, then, is a contract in limbo. It is not an existing contract to be enforced by arbitration without court permission. Yet, if the bankruptcy court orders arbitration, the contract is of sufficient vitality to support such an order. We conclude that the party seeking to arbitrate under a collective bargaining agreement must seek and receive authorization of the bankruptcy court for other reasons as well.

There must be judicial control over the exercise of the right to arbitrate just as there is over other rights and duties of the bankrupt. For now an additional consideration has been added, the rights of the creditors. See *Johnson v. England*, 356 F.2d 44 (9 Cir.), cert. denied, 384 U.S. 961 (1966).

Moreover, we can see no reason why court approval must be had for arbitration upon a stipulation (Rule 919(b)) and dispensed with when the arbitration was agreed upon in an earlier contract. In either case, the same rights of creditors are involved and the obligation of the bankruptcy court to protect all concerned is the same." slip op. at 5177-5178. (Emphasis added).

In view of the foregoing ruling by the Court, neither Judge Werker nor Mr. Kruger could order or consent,

respectively, to Himoff's participation in the consolidated arbitration without prior reference to the Bankruptcy Court.

The language of the Bankruptcy Act and Rules of Bankruptcy Procedure, particularly Section 11(a) of the Act (11 U.S.C. §29) and Rule 401(a) of the Rules provides further authority for the stay of any proceedings against Himoff. Rule 401(a) and Section 11(a) of the Act provide that suits and actions against the bankrupt are to be stayed.

Several of the appellees have argued that the term "action" as used in Rule 401(a) does not include arbitrations, however, they cite only *Collier On Bankruptcy* who, in turn, cites the rather antiquated decision of *The Matter of Markowitz Company Inc.*, 6 Am. B. R. (N.S.) 221 (1925) which was decided before the promulgation of Rule 401(a) which provided that "actions" as well as suits against the bankrupt are stayed. This Circuit has already held that the term "action", when utilized in Rule 2 Fed. R. Civ. P., is "broad enough to include an arbitration proceeding". *Farr & Co. v. Cia Intercontinental De Navigacion*, 243 F.2d 342, 347 (2nd Cir., 1957). There is no reason to unnecessarily restrict the broad scope of the word "action", especially when the term "actions" in Rule 42(a) Fed. R. Civ. P. has also been held to include arbitrations. *Compania Espanola de Pet. (S.A.) v. Nereus Ship*, 527 F.2d 966 (2nd Cir., 1975).

Thus, in view of the fact that the Rules of Bankruptcy Procedure and the Bankruptcy Act provide for a stay of arbitration against a bankrupt and where neither the Trustee nor the Bankruptcy Court has consented to participate in the arbitration, arbitration against Himoff cannot be had and, therefore, any claim by Himoff against Mardorf for indemnity and/or Himoff's demand for arbitration with Mardorf must fail for mootness.

POINT V**Common Issues of Law or Fact.**

None of the appellees dispute Mardorf's contention that it is not involved in any issue concerning the safe port warranty since no such warranty exists in the Mardorf charter.

Instead, appellees contend that there are other issues common to all charterers which justify consolidation. They point specifically to issues arising under clause 6 (the so-called safe berth clause) and clause 25 (the ice clause) which appear in all of the written charters.

The alleged issues under clauses 6 and 25 are false or fictional, albeit that these clauses are referred to in the plaintiff's complaint.

Paragraph 5 of the complaint charges that the defendants "in breach of their warranties of the safety of *ports* * * * ordered the vessel to the *port* of Churchill * * *" (Emphasis added). In paragraph 6 it is alleged that the *port* of Churchill "was unsafe * * * because of the presence of ice, the movements of aids to navigation off their station due to ice, foul weather, inadequate tug, pilotage and *port* facilities" (Emphasis added).

Paragraph 8 of the complaint alleges that as a result of the "aforesaid unsafe conditions prevailing in the *port* of Churchill" (Emphasis added) the vessel was damaged "while entering the said *port*, while proceeding to her berth, while at her berth and while leaving the *port*" (Emphasis added.) In paragraph 9, the plaintiff repeats that the damage was due to the defendants' negligence and breach of their warranties "in ordering the vessel to an *unsafe port*" (Emphasis added).

Although it is alleged in paragraph 8 of the complaint that the vessel was damaged while proceeding to her berth

and while at her berth, it is clear that the causes of the damage, as alleged, were those set forth in paragraph 6, namely, *prese.* of ice, the movement of aids to navigation, foul weather, inadequate tug, pilotage and port facilities, all of which by their nature are conditions of the port and not the berth. A fair reading of the complaint, therefore, makes it clear that the plaintiff's claim is based only on alleged unsafe conditions of the *port* and not of any berth within the port.

On the other hand, clause 6 of the charter provides simply that the vessel shall load at berths where "the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie aground." There is no allegation in the complaint of lack of sufficient water in the berth or its approaches to keep the vessel afloat and none of the causes alleged to have been responsible for the damage to the vessel are claimed to be conditions peculiar to the vessel's berth. Indeed, they are expressly alleged to be conditions of the *port*.

With respect to clause 25 of the charter, a reading of the clause will disclose that it affords the owner the privilege or option of refusing "to enter an ice-bound *port* or any *port* where lights or lightships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the *port* or to get out after having completed loading or discharging" (Emphasis added). This is in no sense a warranty or representation that the port or the conditions mentioned do or do not exist. It is merely a limitation on the owner's obligation to obey charterer's orders, *Limerick S.S. Co. v. Stott & Co.*, [1921] 2K.B. 614 (C.A.). This Court has ruled to the same effect in not holding charterers liable for ice damage stating that the decision to hold the vessel at the port despite ice danger was the Master's and not the charterer's. *The Terne*, 64 F.2d 502 (2nd Cir., 1933)

cert. denied sub nom. Bergen Lloyd v. Munson Steamship Line, 290 U.S. 635, 548 S.Ct. 63, 78 L.Ed. 552.

For these reasons, no genuine issue of law or fact is presented which involves Mardorf and justifies forcing Mardorf into a consolidated arbitration with other charterers among whom there may be common issues of law or fact.

CONCLUSION

Mardorf's bargain with Himoff was designed, for an additional consideration, to protect it from involvement in long and expensive litigation such as this. It is respectfully submitted that there are no compelling reasons why Mardorf should not have the benefit of that bargain. On the contrary, the requirements justifying a consolidation are not present and to grant it in the circumstance would be an abuse of discretion.

Therefore, it is respectfully requested that the Court reverse the Orders of the District Court of October 16, 1975 and March 9, 1976, to the extent that they compel Mardorf to participate in a consolidated arbitration and dismiss the cross-claims against Mardorf for lack of jurisdiction and insufficiency of service of process.

Dated: New York, New York
October 8, 1976

Respectfully submitted,

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LAWRENCE G. COHEN
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

TRAMP SHIPPING CO., INC.,

81383
LGC
5-60

Plaintiff-Appellee :

GOTAAS-LARSEN A/S, EMERALD SHIPPING
CORPORATION, SANKO STEAMSHIP CO. LTD.,
PARABOLA SHIPPING UK LTD., HIMOFF
MARITIME ENTERPRISES, LTD.,

Docket No.:
76-7180

: CERTIFICATE OF
SERVICE

Defendant-Appellees :

(Of Brief)

-against-

MARDORF PEACH & CO., LTD.,

:

Defendant-Appellant.

-----X

WE HEREBY CERTIFY that two (2) copies of the within
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